OPINIONS BELOW.

No opinion was rendered by the trial court.

The opinion of the Circuit Court of Appeals for the Sixth Circuit is found in 342 F. 2d 957.

A copy of the opinion of the Court of Appeals for the Sixth Circuit is appended hereto in the appendix.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The Judgment of the Court of Appeals sought to be reviewed (Appendix, page 25, *et seq.*), 342 F. 2d 957, was dated and entered April 2, 1965. Petition for Rehearing was filed April 21, 1965, and denied by an Order made and entered April 30, 1965. The statutory provision believed to confer jurisdiction on this Court is 28 U.S.C., Sec. 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. In a policy of automobile liability insurance can an automobile be said to be a replacement under the newly acquired automobile clause for the automobile named in the policy when this is contrary to the clear language of the policy, the intent of the insured, and the evidence of all parties to the action?

2. Can an insurance company deny coverage on a newly acquired automobile about which it was properly notified by the insured because the insured had owned an intervening automobile which was never intended by the insured as a replacement of the automobile named in the policy and about which interven-

ing car the insured never notified the company and where the intervening car was disposed of over six months before the accident in question took place?

3. In order for insurance to attach to a newly acquired automobile does the insured first have to transfer the old automobile in a completely legal manner to someone else when the rules say only that the old car must be "discarded" or "disposed of"?

4. Can a party to a jury trial who offers no objection or instruction prior to the jury's deliberation claim after the verdict against him that the instructions given to the jury by the trial court had a special meaning completely different from the normal one used by the jury?

STATUTES INVOLVED.

There are no statutes involved in the determination of this case.

STATEMENT OF THE CASE.

This is an action brought by the Petitioner, Edythe Yenowine, in Jefferson Circuit Court, Louisville, Kentucky, against the Respondent, State Farm Mutual Automobile Insurance Company, seeking to compel it to pay judgments totaling $18,260.39 which were previously obtained against her in said court on April 20, 1962, by the other Petitioners, Elsie Densmore, Donald D. Densmore, and Daniel W. Rowe, Administrator of the Estate of Lila Crawford, deceased, together with the cost of defending the State Court action including

her attorney's fee incurred therein in the sum of $1,000.00 and for her medical and hospital expenses incurred in the further sum of $1,369.00 all as provided for in a policy of insurance #332-085-F15-17 which she obtained from Respondent on April 7, 1956 (Record 26a) and which was still in full force and effect at the time of the automobile collision in question in June, 1961 (Record 2b, 16a).

The case was removed by Respondent to the U. S. District Court for the Western District of Kentucky at which time an intervening complaint was filed by the Petitioners, Elsie Densmore, Donald D. Densmore, and Daniel W. Rowe, Administrator of the Estate of Lila Crawford, deceased (Record 20a) seeking to have Respondent declared liable to pay the aforesaid judgments which they had obtained against Mrs. Yenowine.

The facts as established in evidence at the trial showed that Mrs. Yenowine had owned a 1953 Plymouth car which she covered by the insurance policy in question on April 7, 1956 (Record 26a). Thereafter, on August 11, 1960, she purchased a 1955 Plymouth automobile and did not trade the 1953 Plymouth in on the 1955 Plymouth because she had previously promised it to her son, Larry (Record 4b). Mrs. Yenowine drove the 1955 Plymouth for a few days and then discovered that it was burning oil (Record 41a) and decided that it was not a good car and that she did not wish to keep it (Record 28a). Mrs. Yenowine contacted the dealer who said that he would look for a better car for her (Record 3b). On November 30, 1960, the dealer took back the 1955 Plymouth and sold

Mrs. Yenowine a 1956 Plymouth automobile (Record 4b, 5b). It was this 1956 Plymouth which Mrs. Yenowine was driving on June 9, 1961, when the subject collision occurred (Record 11a) resulting in serious and permanent injuries to Elsie Densmore and Donald D. Densmore and causing the death of Lila Crawford.

Mrs. Yenowine did not call Respondent to report her purchase of the intervening 1955 Plymouth because she did not intend to keep it (Record 28a) and this was corroborated by Respondent (it claimed it never heard from her at all (Record 22b)). However, after acquiring the 1956 Plymouth and within the thirty day period required in her policy, sometime around December 15, 1960, she did telephone the local State Farm agency and reported the change of cars, to-wit: The 1956 Plymouth in place of the 1953 Plymouth (Record 36a, 25b, 26b).

From the time that Mrs. Yenowine acquired the intervening 1955 Plymouth on August 11, 1960, and when she obtained the 1956 Plymouth in November, 1960, which was involved in the collision, the 1953 Plymouth remained sitting in the drive at her home (Record 6b). She did not spend another dime on the 1953 Plymouth (Record 31b) and the car was never licensed for 1961 or any other year (Record 9b, 29b, 30b) and for several months priod to June 9, 1961, the date of the collision, the 1953 Plymouth was not driveable because the battery was down (Record 28b, 29b) and the 1953 Plymouth was still undriveable in 1962 when it was eventually transferred out of the

family and had to be towed in (Record 29b, 30b) at which time it still had the 1960 license attached (Record 30b). In fact the 1953 Plymouth was never driven after February, 1961 (Record 41a) and the only times the 1953 car was ever driven after Mrs. Yenowine acquired the 1956 Plymouth was once by her in January, 1961 (Record 42a) which was after the insurance had been removed from it in December, 1960, and a time or two by her son Larry who sneaked it out without her knowledge because he knew it had no insurance (Record 27b) and he had been told by her not to drive the car until he placed insurance on it (Record 6b).

Prior to the trial of this case the trial court had overruled State Farm's motion for summary judgment and in its Order (Record 24a) the court declared that there were two issues of fact to be determined, namely, as to whether (1) the 1956 Plymouth automobile replaced the 1953 Plymouth described in the policy issued by State Farm to Mrs. Yenowine and (2) whether Mrs. Yenowine notified State Farm within thirty days after her purchase of the 1956 Plymouth as a replacement of the car described in the policy.

At the trial the court submitted these issues to the jury in the form of four interrogatories (Record 67a) whose composition and wording were agreed to by all parties and which included two interrogatories setting out Respondent's two theories of the case: Either that the 1955 Plymouth replaced the 1953 Plymouth or that the 1956 Plymouth replaced the 1955 Plymouth. The trial court also gave the jury its instruction of what

constituted a replacement automobile (Record 66a) *which was likewise agreed to by all parties.*

The verdict of the jury as shown by its answers to the interrogatories (Record 67a) was that Mrs. Yenowine had called State Farm within thirty days after acquiring the 1956 Plymouth and reported the change of cars to the insurance company and that the 1956 Plymouth in fact replaced the 1953 Plymouth described in the policy.

State Farm filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial which was overruled by the trial court (Record 71a) which then entered judgment on the jury's verdict (Record 72a-74a).

Respondent appealed from the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit which reversed the action of the District Court. A Petition for Rehearing which raised substantially the same questions presented herein and which requested withdrawal of the opinion and substitution of a new opinion affirming the judgment of the District Court was overruled without comment.

REASONS FOR GRANTING THE WRIT.

The Judgment Rendered by the Court Below Should Be Reviewed by This Court to Correct an Injustice and Because It Decides an Important Question of Law Affecting in a Serious Manner the Rights of Holders and Third Party Beneficiaries of Automobile Liability Insurance Policies Not Only Contrary to How Such Question Has Been Decided by Another Federal Court of Appeals, But Also Contrary to the Kentucky Court of Appeals as Well, Which Should Be Settled by This Court.

The judgment of the court below that the intervening 1955 Plymouth replaced the 1953 Plymouth named in the policy of insurance and that the 1956 Plymouth which was involved in the accident replaced the 1955 Plymouth is contrary to the clear language of the insurance policy, the intent of the insured, the evidence of all the parties, and the law.

The court below in its consideration of the replacement of the 1953 Plymouth by either the 1955 Plymouth or the 1956 Plymouth dealt with only three of the four interrogatories answered by the jury as being "applicable" (Appendix, page 28) and omitted any consideration of the interrogatory wherein the jury decided that Mrs. Yenowine notified the Respondent in December, 1960, to change the insurance from the 1953 Plymouth to the 1956 Plymouth which was involved in the accident (Record 67a). The court below in making its decision that the issue of notice had no significance made a crucial mistake since it is demonstrable that this interrogatory and its answer

by the jury together with the lack of notice to the Respondent by Mrs. Yenowine as to the intervening 1955 Plymouth (both of which matters were not passed upon by the court below) are of absolutely vital importance to the correct decision of this case.

Mrs. Yenowine testified that she did not notify the Respondent about acquiring the intervening 1955 Plymouth since she did not intend to keep it (Record 28a) and this was corroborated by the Respondent (it claimed that it never heard from her at all (Record 22b)).

The court below in its opinion (Appendix, page 29) cited testimony of Mrs. Yenowine and the automobile salesman concerning their statements about "replacing" the 1955 Plymouth with the 1956 Plymouth. It is respectfully submitted that this layman's use of the word "replacement" has absolutely no significance whatsoever. The term "replacement" as used in this case has a very special meaning as defined by the courts in many decisions *(including the trial court in the case at bar)* and is also defined in the policy of insurance in question and it is these meanings only which are important.

Referring to the definition of what constitutes a newly acquired or "replacement" automobile under the policy (Record 75a) it is stated:

> "III. Automobile Defined.
>
> (a) AUTOMOBILE. Except where stated to the contrary, the word 'automobile' means:
>
> (1) DESCRIBED AUTOMOBILE—the motor vehicle or trailer described in the declarations:
>
> * * * * * * *

(4) NEWLY ACQUIRED AUTOMOBILE—an automobile, ownership of which is acquired by the named insured * * * if (a) it replaces an automobile owned * * * and covered by this policy, or the company insures all automobiles owned by the named insured * * * on the date of its delivery, *and (b) the named insured * * * notifies the company within thirty days following such delivery date* * * *." (Emphasis added.)

It is therefore apparent under this policy that before there can be a replacement automobile the insurance company must be notified by the insured and as stated, *supra*, it is undisputed that Mrs. Yenowine never notified the Respondent of the intervening 1955 Plymouth and hence that car could not possibly have replaced the 1953 Plymouth nor could the 1956 Plymouth have replaced the 1955 Plymouth in the policy since as demonstrated hereinabove the 1955 Plymouth never came into the picture at all in so far as the policy is concerned which, of course, is the whole point of this issue and of this case. During the oral argument of this matter in the Court of Appeals counsel for Petitioners pointed out this feature of the policy and *counsel for Respondent in his rebuttal made no reply to it.* If Mrs. Yenowine had had an accident with the intervening 1955 Plymouth during the more than three months she owned it the Respondent would undoubtedly have refused coverage by relying on the lack of notice.

The court's holding below that the issue of notice was "not applicable" is directly contrary to the holding of the Court of Appeals for the Fourth Circuit

which construed the same type of newly acquired automobile clause relating to the replacement of an automobile named in a policy which required ten days' notice and held in the case of *Mitcham* v. *Travelers Indemnity Co.*, 127 F. 2d 27 (1942), as follows at page 29 of the opinion:

> "There is another insuperable objection to the recovery under the policy in suit. The provisions of Article IV in regard to the automatic transfer of the insurance from one car to another expressly 'do not apply * * * unless the named insured notifies the company within ten days following the date of delivery of such other automobile.' The insured did not comply with this requirement. The new car was delivered on January 20, 1940, and the insured was killed while driving it on February 1, 1940. It was only after his death and after liability for damages had been incurred that the company was notified that the new car had been purchased and that a transfer of the insurance was claimed.
>
> "The requirement of notice was of obvious importance to the company. Amongst other purposes it served to inform the company of the identity and character of the vehicle to be covered by its policy and to enable the company to exercise the rights reserved to it in the policy and to ascertain whether the insured had complied with his obligations thereunder. It cannot be said that the policy provision was so immaterial to the risk that it could not be invoked for the purpose of avoiding the company contractual liability. * * *. The failure to give the notice was fatal to the claim

of the administratrix and the injured person that the car was covered by the policy when the accident took place."

In addition the holding of the court below on this issue is also contrary to the law of the State of Kentucky as set forth in the recent case of *Brown* v. *State Farm Mutual Automobile Insurance Co.*, Ky., 306 S. W. 2d 836 (1957).

This was a case involving a policy issued on June 13, 1955, covering a Studebaker. At that time the insured also owned a 1947 Ford car and a 2-ton Ford truck, neither of which was covered by the policy. The Studebaker became inoperable and the insured installed a new motor in the Ford car in July, 1955, thus putting it in driving condition and began using it. On or about August 25, 1955, the insured had an accident while driving the Ford car. Immediately after this accident he notified the Company thereof and requested it to defend him against any suits the injured persons might bring. On November 23rd, the Company wrote appellant a letter in which it denied all liability under Section IV of the policy requiring notice be given to it of a newly acquired automobile (Respondent in the case at bar took the same action with Mrs. Yenowine (Record 30a)). The policy provision regarding what constitutes a newly acquired automobile required notice within thirty days and is similar to the one at bar. The court in holding that there was no replacement of the Studebaker by the Ford car said at pages 837-838:

> "* * * This policy does not appear to us to be ambiguous, and it plainly refers to a 'newly acquired automobile' and requires the insured to notify the Company of the replacement within thirty days following the date of the delivery of the newly acquired car to him. In this instance appellant's Ford car was not 'newly acquired' but was owned by him long before he took out insurance on the Studebaker. Nor did he notify the Company that the Ford was replacing the Studebaker *within thirty days after the Ford was delivered to him,* since he owned the Ford car at the time he insured the Studebaker * * *. Manifestly, appellant could not replace the Studebaker with the Ford without notifying the Company * * *." (Emphasis by the Court.)

Our position on this issue is also supported by other authority. In the case of *Maryland Casualty Co.* v. *Toney,* 178 Va. 196, 16 S. E. 2d 340 (1941), where the court in ruling on a situation where the question was whether or not an automobile was a replacement under a newly acquired automobile clause where ten days' notice was required under the policy, said at page 343 of the opinion:

> "* * * The manifest purpose of the 'Automatic Insurance' provision is to have the coverage attach to the newly acquired car at the earliest time the insured needs protection, *provided he notifies the insurer within ten days of the commencement of such coverage.*" (Our emphasis.)

As further proof of the fact that the intervening 1955 Plymouth should have played no part in the

decision of the court below we cite this Court to the case of *Kaczmarck* v. *LaPerriere,* 337 Mich. 500, 60 N. W. 2d 327 (1953), which covered a situation similar to the one at bar. In the *Kaczmarck* case the policyholder traded the Packard named in the policy in on an intervening Oldsmobile *without notifying the insurance company of this Oldsmobile* and then disposed of the intervening Oldsmobile when he acquired a Pontiac automobile with which he had an accident. The defendant insurance company disclaimed responsibility because of the intervening car (as Respondent does here) but the court held that the insurance coverage applied on the Pontiac car, saying at page 329:

> "* * * The fact that during the intervening period he had owned an Oldsmobile, which he seldom operated and never sought to have covered under the policy, in no wise served to make the Pontiac, at the time of the accident, any less a replacement of the Packard. He notified defendant company of his acquisition of the Pontiac within 30 days from the date of its delivery to him, this making automatic insurance effective on it under clause VII."

Also in connection with this *Kaczmarck* case we point out the fact that the intervening Oldsmobile was owned by the policyholder for over seven months or almost twice the length of time Mrs. Yenowine had the intervening 1955 Plymouth and which she had disposed of on November 30, 1960, which was over six months prior to the accident of June 9, 1961.

The rule given to the jury by the District Court (Record 66a) as to what constituted a "replacement" automobile was:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner discards the old vehicle or retains the old vehicle not in working condition."

Neither this rule (nor the rule substituted by the Court of Appeals in its opinion herein (Appendix, page 28) says anything about the old car having to be given or sold in a completely legal manner to someone else in order that it be considered discarded (or disposed of). The court below has stated in the opinion (Appendix, page 32) that Mrs. Yenowine failed to make a legal gift of the 1953 Plymouth to her son and therefore she failed to dispose of the car. We submit that the plain language of the rule does not require a legal transfer to someone else—that it would have been simple enough for the rule to have said so in plain and unmistakable language if that was the meaning intended—*and, in fact, one would actually expect it to be so declared if such was the only meaning to be given to it* and that in the absence of such wording the rule and its language should be interpreted according to their usual and generally accepted meanings as shown by these definitions in Webster's New International Dictionary, Second Edition, to-wit:

To dispose of (page 752):

> "a. To determine the fate of; to fix the condition, employment, etc., of; to direct or assign for a use.

"b. To get rid of; to put out of the way; to finish with; as, to dispose of rubbish; to dispose of the morning's mail."

To discard (page 742):

"2. To cast off or dismiss as useless or as no longer of service; to put aside; reject, get rid of; drop; as, to discard old friends; discard a winter coat; discard a hypothesis.

"Syn. To discard, as here compared, is to put or throw aside or away, esp., as useless or outworn, something which one already has."

Applying the above definitions to the facts of the case at bar it is clearly evident that there is a heaping amount of evidence in the record to sustain the jury verdict that Mrs. Yenowine had discarded (or disposed of) the 1953 Plymouth:

1. She promised her son Larry that the 1953 Plymouth was his and that he could drive it whenever he had it insured (Record 4b).

2. After she acquired the 1956 Plymouth she did not spend another dime on the 1953 Plymouth (Record 31b).

3. The 1953 Plymouth was left standing in the driveway (Record 6b) where it remained until towed away months later in an undriveable condition (Record 29b, 30b).

4. The 1953 Plymouth was never licensed again and still had a 1960 license plate on it when it was towed away in an undriveable condition in 1962 (Record 29b, 30b).

5. Mrs. Yenowine never again drove this car (except for one time in January, 1961) (Record 42a, 29b) which was *after* the insurance had been removed from it.

6. As corroboration of the fact that the car was abandoned by Mrs. Yenowine is also the fact that it deteriorated through disuse in that the battery ran down (Record 29b).

7. Mrs. Yenowine, a widow, was employed as a hospital switchboard operator (Record 31b) and had absolutely no use for two cars and couldn't afford to maintain them both even if she wanted to—she was even financially unable to help her son Larry obtain insurance on the 1953 Plymouth (Record 30b) which is the reason it remained just standing in the drive.

8. Mrs. Yenowine's call to the insurance company in December, 1960, requesting removal of the insurance from the 1953 Plymouth and the placing of coverage on the 1956 Plymouth (Record 36a, 25b, 26b, 27b) in itself furnishes evidence that she was through with the old car.

9. When the 1953 Plymouth was traded off in 1962 as down payment on a car for her daughter, Mrs. Yenowine first requested and obtained her son Larry's permission before doing so (Record 31b). Since Larry was under age (Record 9b) and couldn't make a valid transfer of the car, Mrs. Yenowine made the bill of sale.

Since the jury decided the case in the Petitioners' favor in the trial court, Petitioners are entitled to have their evidence read in the light most advantageous to them and to be given the benefit of every inference of

fact fairly deducible therefrom and that where there is evidence tending to support the verdict that a motion for judgment N.O.V. should be refused. *American Jurisprudence, Judgments,* Volume 30A, Section 300, pages 354-355. In addition, the evidence favorable to the Petitioners' position together with the inferences that may reasonably be drawn therefrom are to be accepted as true. *Michelson* v. *House* (1950), 54 N. M. 197, 218 P. 2d 861; *McPhilomy* v. *Lister* (1941), 341 Pa. 250, 19 A. 2d 143, 142 A. L. R. 385. And to grant the motion the Court should be able to say that there is neither evidence nor inference from which the jury could have arrived at its verdict. *Chandler* v. *Battenfield* (1951), 55 N. M. 361, 233 P. 2d 1047; *Michelson* v. *House* (1950), 54 N. M. 197, 218 P. 2d 861.

The Respondent was content to have the trial court submit to the jury the definition of what constituted a replacement automobile without objection by said Respondent and without any request by it that the trial court should further define the word "discard" contained therein as meaning "a legal transfer to another person." Since the jury was not given any special definition by the trial court of "discard" the jurors apparently applied the normal meaning of the word *(What else could they have done?)* in arriving at their finding that Mrs. Yenowine had (to paraphrase what the dictionary says, *supra*): "put or threw aside or away (the 1953 Plymouth) which (she) already had."

It is clear that the 1955 Plymouth car never replaced the 1953 Plymouth because Mrs. Yenowine did not notify the insurance company about it, thus leav-

ing the only remaining possibility, namely, that the 1956 Plymouth replaced the 1953 Plymouth *as the jury so found.* Mrs. Yenowine had insurance coverage only on the 1953 Plymouth until December, 1960, when she notified the insurance company to transfer the coverage to the newly acquired 1956 Plymouth *(as the jury again found and which finding the Respondent has never challenged).* The only possibility for coverage on the intervening 1955 Plymouth (and it was only a possibility) arose during the 30-day period between August 11, 1960, when she acquired it, to September 10, 1960, when the time expired under the policy for notifying the company, and there is authority in the case of *Merchants Mutual Casualty Company* v. *Lambert,* 90 N. H. 407, 11 A. 2d 361, 362, 363 (1940), showing that since the insurance company did not have a clause in the policy covering this situation that it was properly disregarded by the trial court as being "indecisive."

As stated above, the insurance on the 1953 Plymouth ceased when Mrs. Yenowine called the company in December, 1960, and thereafter this car ceased to constitute any risk to the Respondent and so whether she drove this car afterward only once (as she did) or a thousand times is of no consequence at all since it was then uninsured and the insurance company would have denied liability because of the said notice and the removal of coverage from this car.

We respectfully submit that it was the mistake of the Court of Appeals in not thinking the issue of notice was "applicable" (Appendix, page 28) and its failure

in said opinion to relate this vital issue of notice to the facts of this case—both the lack of same by Mrs. Yenowine as to the 1955 Plymouth and the *unchallenged* finding of the jury that she did give notice on the newly acquired 1956 Plymouth and the consequent removal of coverage to the 1953 Plymouth—that the court below came to feel as it stated in the opinion (Appendix, page 32) that "Mrs. Yenowine (was) receiving insurance coverage for two automobiles at the same time for a premium insuring only one car." When the notice factor, which was entirely omitted and untouched upon by the Court of Appeals, is related to the case all thoughts of "dual coverage" are shown to be completely groundless.

We call the Court's attention to the fact that there is a body of law in several states having compulsory Financial Responsibility laws (as Kentucky does) holding that an insurer cannot interpose the defense of an alleged breach of the policy by the insured against innocent injured third parties, 29 A. L. R. 2d 817 (although apparently Kentucky does allow such defenses). Our point here is that from a moral consideration since the Respondent has been allowed to use such defenses against the intervening Petitioners that they should be given the aid of *all* the applicable law including any exceptions to the general rule under which this case was tried. Therefore, the intervening Petitioners are entitled to claim an *added* right to rely upon the cases allowing coverage where there is "temporary retention" such as the one of *Brescoll* v. *Nationwide Mut. Ins. Co.*, 116 Ohio App. 537, 22 Ohio

Ops. 2d 423, 189 N. E. 2d 173 (1961), *where the court in that case allowed coverage even where the old car was retained by the policyholder at the time of the accident and was in a driveable condition for six weeks prior to said accident where the new car was actually purchased to replace the car named in the policy for the same use.* (In the Yenowine case at bar the 1953 Plymouth described in the policy was undriveable for several months prior to the accident of June 9, 1961, and remained so afterwards (Record 9b, 29b, 30b.))

It is manifest that only by changing the trial court's definition in its instructions to the jury of what constituted a replacement to read:

> "A newly acquired automobile becomes a replacement as used in these instructions when it is acquired in fact as a replacement and the owner *(legally transfers ownership of the old vehicle to another person)* or retains the old vehicle not in working condition,"

can there be a basis for saying that Mrs. Yenowine failed to discard (or dispose of) the 1953 Plymouth. Since the Respondent accepted the definition of "replacement" as given in the instructions to the jury by the trial court without objection by the Respondent and without requesting that the term "discard" contained therein should be defined, *and apparently couldn't have made such a request even if it had wished since Respondent at no time has ever cited any authority upholding such a construction of the words "discard" (or "disposed of") as shown above in our*

revised definition of "replacement," it is therefore apparent that the jury and the trial court correctly decided the issue.

Also, having agreed to let the jurors decide the issue of whether or not Mrs. Yenowine discarded the 1953 Plymouth according to the jurors' understanding of the term "discard" in its normal meaning, the Respondent is, in addition, now estopped to suggest a different meaning to the word than the usually accepted one applied by the jury. Rule 51 of the Federal Rules of Civil Procedure provides:

> "Instructions to Jury; Objection.
>
> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. *No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the ground of his objection.* Opportunity shall be given to make the objection out of the hearing of the jury." (Emphasis added.)

CONCLUSION.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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